

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

MONDAY, THE 25TH JUNE 2007 / 4TH ASHADHA 1929

CRL.A.No. 441 of 1998()

**CC.1030/1993 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, KANNUR
DT. 29.7.1997**
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APPELLANT:

**P.DIVAKARAN, S/O. KUMARAN VAIDYAR,
PROPRIETOR, M/S.FLASH INVESTMENT,
& TRADERS, FORT ROAD, KANNUR.**

BY ADV. SRI.V.RAMKUMAR NAMBIAR

RESPONDENT:

**C.K.RAJAN, PROPRIETOR ,
M/S.NEW FLASH TAILORS, FOR ROAD,
KANNUR.**

BY ADV. SRI.V.R.KESAVA KAIMAL

SRI.N.M.MADHU

BY PUBLIC PROSECUTOR SRI.C.K.SURESH

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 25/06/2007, ALONG WITH CRA NO. 1163 OF 2001 THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:**

K.R.UDAYABHANU, J

Crl.A.No.441 of 1998 &
Crl.A.No.1163 of 2001

Dated this the 25th day of June, 2007

JUDGMENT

Appeal No.441/98 is filed challenging the order in C.C.1030/93 in the file of JFCM, Kannur with respect to the alleged borrowal of a sum of Rs.48,000/- and the dishonour of the cheque issued for the same. Crl.A.No.1163/2001 is filed challenging the order in C.C.No.1089/93 with respect to the alleged dishonour of the cheque for a sum of Rs.92,850/-. Both the cases were tried jointly and disposed of by a common judgment.

2. The evidence adduced in the matter consisted the testimony of Pws. 1 and 2 and Exts. P1 to P6. Defence examined as Dws. 1 to 4 and produced Exts. D1 to D8. PW1 is the complainant and PW2 is the Bank Manager who was examined to prove the dishonour of the cheques for want of funds in the account of the accused. It is the complainant's case as mentioned

in the respective complaints i.e, a sum of Rs.48,000/- and a sum of Rs.92,850/- were borrowed and the impugned cheque for a sum of Rs.48,000/- dated 6.11.1993 was issued and with respect to the borrowal of Rs.92,850/-, the cheque dated 15.11.1993 was issued. Although, respondent/accused had sent reply notices asserting the contention that he borrowed only a sum of Rs.40,000/- and that he was paid at the time only Rs.34,000/- deducting Rs.6,000/- as interest and the balance he had remitted in instalments which is evidenced by Ext. D2 pass book.

3. It is seen mentioned by PW1 in the cross examination that a sum of Rs.92,850/- was paid on 15-5-1993 and later he says that only a sum of Rs.85,000/- was given and it is inclusive of one year's interest that the amount is mentioned as Rs.92,850/-. But it has to be noted that the cheque dated is 15-11-1993. Further more the court below has observed that the interest as claimed by the appellant at the rate of 18% would not tally with the amount shown in the impugned cheques, i.e. Rs.48,000/-. A sum of Rs.40,000/- allegedly given to the accused and Rs.85,000/- subsequently given. Another

improbability noted is that 6-5-1993 is the date of the cheque for Rs.48,000/-. The date of lending of Rs.85,000/- mentioned is 15-5-1993. The point is that a person who owed a sum of Rs.48,000/- and when above and the amount is due on 6-5-1993, it is unlikely that he would have given Rs.85,000/- on 15-5-1993, i.e. just within a fortnight. Further more, the version of the complainant in the complaints filed and in his chief examination is just that the amounts borrowed are Rs.48,000/- and Rs.92,850/-, the cheques were issued, that is why the fact that the accused had sent reply notice asserting his contention that only Rs.40,000/- was borrowed altogether and that he was given at the time of borrowal only a sum of Rs.34,000/- and a sum of Rs.6,000/- was retained by the complainant towards interest and that he paid the balance in instalments. He has even specifically alleged in the reply notice that the instalment payments used to be collected by the employee of the complainant one Kuttikrishnan (he was examined as DW3). It is also stated in the reply notice that a signed blank cheque leaf bearing No.0552881 was issued at the time of borrowal of

Rs.40,000/- and that the same was substituted two other blank cheques subsequently when the first cheque date has expired. The accused has also produced the torn pieces of cheque leaf No. 0552881 which according to the accused was torn at the time when the two other blank cheques were given. He had also instituted O.S.No.543/1993 against the complainant seeking for an injunction to restrain the complainant from presenting the cheques. The same is also mentioned in the reply notice sent. The defence have also produced Exts.D4 to D8, copies of injunction application etc. with respect to O.S.543/1990. The accused has also produced Ext.D2 a pocket note book which he has mentioned as pass book wherein the entries of daily payments are noted and the signatures of DW3 admittedly are seen in the above pocket book. As per Ext.D2 entries the amounts would work out to around Rs.20,000/-. It is the case of DW1 that only a sum of Rs.7,000/- and odd was due towards the interest to the borrowal of Rs.40,000/-. According to him, he had tendered the above amount but the complainant insisted for Rs.20,000/- which he declined and hence the proceedings. The

evidence of DW3 is that Ext.D2 is with respect to the amount due from DW3 himself. According to him, the accused had borrowed Rs.10,000/- from him. The trial court found that DW3 is not a person having sufficient resources to lend Rs.10,000/- to the accused. Although the evidence of Dws.1 and 2 who were sought to be occurrence witnesses with respect to the borrowal to the amount and the issuance of the two blank cheques at the time when the earlier given cheque i.e.Ext.P3 was torn by the complainant can be rejected as simply oral evidence, I find that the circumstances appears to be quite telling in support of the plea of the accused. The decision that the complainant has failed to prove the allegations of the offence beyond reasonable doubt is not liable to be interfered by this Court in exercise of appellate jurisdiction. Hence, the Appeals are dismissed.

ks.

K.R.UDAYABHANU, JUDGE

K.R.UDAYABHANU, J

CRL.A.NOS.441 OF 1998 &
1163 OF 2001

JUDGMENT

27-6-2007